HARVARD

LAW REVIEW.

VOL. XIX. FEBRUARY, 1906. NO. 4.

EQUITABLE CONVERSION.[1]

VI.

IT has often been declared judicially that the equitable conversion of money into land has the effect of vesting the equitable ownership of the land in him in whose favor the conversion is made, and not unfrequently the same effect, *mutatis mutandis*, has been attributed to the equitable conversion of land into money. Moreover, the courts which have so declared, while they have generally had before them no more than a single concrete case of equitable conversion, have made the declaration broadly, and as applicable to equitable conversions of every kind, or, at least, they have not intimated that the doctrine which they were declaring involved any division of equitable conversions into classes, nor that there was any class of such conversions to which the doctrine was not applicable. In order, however, to test the correctness of the doctrine, it is necessary to consider it in its application to each of the two great classes of equitable conversions, namely, those which are direct and those which are indirect; and, for the purpose of considering it in its application to such equitable conversions as are indirect, it will be desirable to separate the latter, as I have done in a previous article,[2] into such as are caused by the common bilateral contract for the purchase and sale of land, those which are caused by a unilateral covenant to purchase *or* sell land, and those which are caused by means of a trust or duty to purchase or sell land.

[1] Continued from 19 HARV. L. REV. 96.

[2] 18 HARV. L. REV. 250–268.

When a contract is entered into for the purchase and sale of land, and the purchaser dies pending the contract, it has always been held, as we have seen,[1] that his heir or devisee is entitled to enforce the contract against the seller for his own benefit, and at the expense of the purchaser's executor, and this has been supposed to involve the doctrine that the land passes in equity from the seller to the purchaser the moment when the contract is made, and so passes on the death of the latter to his heir or devisee, though I have endeavored to show[2] that it involves only the doctrine that, on the death of the purchaser, his right under the contract to have the land conveyed to him devolves in equity on his heir or devisee, just as the land would if the contract had been performed before the purchaser's death, though the purchaser's concurrent obligation to pay the purchase money devolves, both at law and in equity, on his executor. If I am right in this, it will follow that the decisions which have been made in favor of the purchaser's heir or devisee establish only that such heir or devisee is entitled to enforce the contract specifically for his own benefit, — not that he is the owner in equity of the land purchased. But, however that may be, it is important to ascertain how the question stands upon principle. Clearly, the burden rests upon those who assert that the contract itself has the effect of passing the land in equity, to show some principle of equity which gives the contract that effect. What do they show? They say equity considers as done whatever is agreed to be done. Equity, however, has no such principle as that, and the only one which resembles it is the principle that whatever is agreed to be done equity considers as done at the time when it is agreed to be done,[3] and when, consequently,

[1] 18 HARV. L. REV. 250–251. [2] *Ibid.*

[3] The case of Gibson *v.* Lord Montfort, 1 Ves. 485, is very instructive in this connection. The question there was whether the heir or the devisee of a deceased testator was entitled to certain land which the testator had contracted for before making the first codicil to his will, — which, however, was made before the contract was performed, and even before the date fixed for its performance; and the question between the heir and the devisee was supposed to depend upon whether the land passed to the testator in equity before the date of the first codicil; and Lord Hardwicke said (p. 494): "The contract was before the first codicil, and went a great way to end the question. But the first codicil came before the time for the execution of these articles, which is the only difficulty; for, though things agreed on are looked upon as executed here, yet this is not such an agreement as could be executed at that time, the time for execution not being come; but that seems too nice, for, on a contract for lands, if the party die before the time for making the conveyance comes and without a will, the court considers it for the benefit of the heir that the land should be purchased for him, and, if so, why not for the devisee?" It seems plain, therefore, that Lord Hardwicke

it ought to be done, and it is needless to say that that principle furnishes no warrant for saying that the contract in question passes the land in equity the moment when it is made, especially as a considerable length of time always elapses between the making and the performance of a contract for the purchase and sale of land, and the contract, if properly drawn, always names a future day when the purchase shall be completed. Moreover, the question is whether the land passes to the purchaser in equity at the moment when the contract is made, — not whether it passes to him at any subsequent time, for it is confessedly at the moment when it is made that the contract works an equitable conversion, and it is because it works an equitable conversion that it is supposed to pass the land in equity, nor is it possible to assign any other time for the passing of the land in equity prior to the time fixed for the completion of the purchase. Finally, if, as will be shown to be the fact, an equitable conversion of money into land by means of a unilateral covenant to purchase land or by means of a trust or duty to purchase land never passes the land in equity, this will prove that there is no necessary connection between the indirect equitable conversion of money into land and the passing of the title to the land in equity, and that the former can take place without the latter; and yet practically the only reason why the courts have declared that a contract for the purchase and sale of land passes the land in equity is that they supposed that to be the only theory upon which the heir or devisee of a purchaser who dies pending the contract, can enforce the latter for his own benefit. Upon the whole, then, it seems pretty clear upon principle that a contract for the purchase and sale of land has no other effect in equity than it has at law unless and until it is broken by the seller's failure to convey the land according to his agreement, and unless the purchaser die before any such breach, though, in the latter event, the purchaser's right under the contract will devolve in equity upon his heir or devisee as before stated.

---

professedly decided the case upon authority, and not upon principle, *i. e.*, he regarded it as settled by authority that if the testator had died the day on which he made the codicil, but without making it, the land would have descended to the heir, and, if so, it ought to pass by the first codicil to the devisee.

So in Goodwyn *v.* Lister, 3 P. Wms. 387, Lord Chancellor Talbot said (388): "Whenever one man enters into articles for the sale of an estate, and agrees to convey it to another, in consideration of a sum of money engaged to be paid by that other person; *from the time the articles ought to be performed*, the one becomes entitled to the estate, and the other a creditor for the purchase-money."

What is the effect in equity of the contract for the purchase and sale of land upon the seller's right to receive the purchase money, over and above the effect of the same contract at law? It seems that it is nothing. The courts have, indeed, tried hard to persuade themselves that, as such a contract passes the land in equity to the purchaser, so it passes the purchase money in equity to the seller. It has (for example) been a favorite saying with them that, from the moment when such a contract is made, the seller becomes a trustee of the land for the purchaser, and the purchaser becomes a trustee of the money for the seller; but they have never been able to show that the second part of this proposition has any meaning or has borne any fruit, nor, in truth, has it any meaning nor has it ever borne, nor can it ever bear any fruit, and the reason is obvious, namely, that, while the seller has the same right to have the purchase money paid to him that the purchaser has to have the land conveyed to him, there is this difference between the land and the money, namely, that the land is identified while the money is not, and that difference renders it impossible that the seller should own the money, either at law or in equity, while it remains in the hands of the purchaser, or that the purchaser should hold any specified money in trust for the seller as such. Before the seller can become entitled to be paid any specific money by the purchaser, there must be an appropriation of some specific money to the purpose of paying for the land, and such an appropriation can be made only by the combined action of the purchaser and the seller.

I have heretofore stated[1] what will become of the purchase money in the event of the seller's dying pending the contract, *i. e.*, that his right under the contract will, like his other contractual rights, pass, at his death, to his executor, who will, in all respects, stand in the shoes of the deceased as to his right to receive the purchase money, and who will need only the same aid from equity that the deceased would have needed, namely, that of compelling an unwilling purchaser to pay for the land by enforcing the contract specifically, instead of leaving the seller or his executor to such special damages as a jury will give him for the loss of the bargain. The seller's executor does, indeed, stand in greater need of this aid from equity than the seller does, for, though the latter fail to obtain specific performance, he will still keep the land while,

[1] 18 HARV. L. REV. 9–10.

upon the death of the seller, the land will devolve, not upon his executor, but upon his heir or devisee; and, though it has been held that, if the executor cannot compel the purchaser to pay for the land, equity will compel the heir or devisee to convey the land to him, yet, as has been seen in a previous article,[1] it seems impossible to discover any principle which will warrant a court of equity in giving such relief.

If a person covenants that he will lay out a given sum of money in the purchase of land and will settle the land in such manner as is stated in the covenant, or if a trust be created for the same purpose, it is certain that no land will pass in equity to any of the persons in whose favor the settlement is to be made until the land is actually purchased pursuant to the covenant or trust, for until then it is wholly uncertain what land will be settled. That no title to land can pass from one person to another, either at law or in equity, until the land is identified, is so plain a proposition that it requires only to be stated in order to gain the assent of every intelligent person. Fortunately, however, it is not necessary, in this instance, to rely merely upon the intrinsic merits of the proposition for establishing its truth, for the proposition that no title passes, in the case now under consideration, is established by an experience which no one can gainsay. In an English settlement of land, the estates limited consist, as we have seen,[2] almost wholly of estates for life and estates tail. These estates, moreover, originally differed but little from each other in respect to the rights of the tenant in possession, for the time being; and, though tenants in tail, if in possession and of full age, have now for centuries been able to exercise complete control over the estate, yet they can do so, even to this day, only by first converting the estate tail into an estate in fee simple. How can this be done? It can now be done by simply executing and acknowledging a disentailing deed, and having the same enrolled, but, prior to Jan. 1, 1833, it could be done only by levying a fine or suffering a common recovery, *i. e.*, by levying a fine a tenant in tail could cut off his issue in tail, and so convert the estate tail into a base fee, and by suffering a common recovery, he could cut off, not only his issue in tail, but also all those in remainder or reversion expectant upon the termination of the estate tail, and so convert the latter into an estate in fee simple absolute. Could a fine be levied or a recovery suffered, however,

[1] 18 HARV. L. REV. 252–254.

[2] 18 HARV. L. REV. 257.

by a tenant in tail who was so in equity only, the legal estate being in a trustee? Such a tenant could go through the forms of levying a fine or suffering a recovery, but his acts would be wholly inoperative at law, as courts of law would regard him as having no estate whatever in the land. Courts of equity, however, could never have permitted equitable estates tail to be created, if a consequence had been that they would be inalienable; and accordingly they held[1] that a fine levied or a recovery suffered by an equitable tenant in tail was perfectly valid in equity, *i. e.*, that it had the same effect in converting the equitable estate tail into an equitable estate in fee simple that a fine levied or a recovery suffered by a legal tenant in tail has in converting the legal estate tail into a legal estate in fee simple. Suppose, then, a covenant or trust to have been created, any time in the eighteenth century, for laying out money in the purchase of land, and for settling the land, and that, if the covenant or trust had been performed, one A, a person of full age, would have been tenant in tail in possession of the land, but that the covenant or trust had not been performed and A did not wish to have it performed, but wished to receive the money instead. Prior to the time of Lord Cowper, he could have obtained payment of the money by filing a bill and obtaining a decree for its payment to him, but Lord Cowper refused to allow such bills, or rather to make such decrees,[2] thinking them to be in violation of the rights of those claiming, or who might in future claim, under the subsequent limitations of the settlement, covenanted or directed to be made, or of those who owned the reversion, if any, expectant on the termination of all the limitations of the settlement. How then could A obtain the money, if it was money and not land that he wanted? for he was clearly entitled to obtain it in some way. If it was true that A's right under the unperformed covenant or trust already consisted in the ownership of land in equity he could suffer a recovery of his existing equitable interest, and then, having become the person solely interested in the performance of the covenant or trust, and having also destroyed the reversion, if

[1] "Trust estates are by their nature incapable of the process of fines or recoveries. Yet fines are levied, and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates." Butler's note to Co. Litt. 290 b, s. XVI. In Pearson *v.* Lane, *infra*, p. 247, the fine was levied, and in Henley *v.* Webb, *infra*, p. 239, the recovery was suffered, by one who had only an equitable estate in the land.

[2] Colwall *v.* Shadwell, cited in Short *v.* Wood, 1 P. Wms. 471, and in Chaplin *v.* Horner, *ibid.* 485. See also *per* Lord Hardwicke in Cunningham *v.* Moody, 1. Ves. 174.

any, expectant on the termination of the limitations covenanted or directed to be made, he could elect not to have the covenant or trust performed, and require the money to be paid over to him. Was this course open to him? No, it seems never to have been supposed or claimed by anyone that it was; but, on the contrary, it was admitted on all hands that the only way in which A could convert his right into an absolute ownership of the money was by first enforcing specific performance of the covenant or trust, and then suffering a recovery of the land, and, finally, selling the land; and experience proved that the most feasible way of doing this often was for A to procure some landowner to convey an estate to the person or persons bound by the covenant or trust, on receiving from him or them the money covenanted or directed to be laid out in land, but under an agreement with A that the latter should suffer a recovery of the land, and thereupon reconvey it to its original owner on receiving from him the money which he had received for the land. The first time that this device (which was called borrowing the estate in question) was resorted to, was in the case of —— *v.* Marsh,[1] 1723, while the last which appears in print was Henley *v.* Webb,[2] 1820. In the latter, the report states that Henley, who occupied the position which I have supposed A to occupy, obtained from Sir J. Webb, Sept. 15, 1781, at the price of £14,200, being the sum which Henley was entitled to have laid out in the purchase of land, a conveyance in fee of an estate, — which Henley, on the same day, conveyed, at the same price, to the trustees of the £14,200, and soon afterwards suffered a recovery thereof, being equitable tenant in tail under the trustees; and, having thus obtained the fee simple of the estate, he reconveyed it to Webb at the same price at which he had purchased it, having in fact agreed to do so when he made the purchase, the intent of the transaction being to make himself master of the £14,200.

I trust that the reader will not want any better proof than the foregoing case affords that Henley's right to have the £14,200 laid out in the purchase of land, and to have the land conveyed to him in tail, did not make him a tenant in tail of land in equity. How, then, are we to account for the fact that we find the contrary so constantly asserted or assumed by courts of equity? I fear we shall have to account for it in the same way in which we have

---

[1] Reported by Peere Williams in a note to Chaplin *v.* Horner, 1 P. Wms. 486.

[2] 5 Madd. 407.

already had to account for so many errors, namely, by the fact that the courts of equity constantly assume that money which is only indirectly converted into land in equity is so converted directly, — in which case the money would in truth be land in equity, *i. e.*, for the purposes of devolution. In Henley *v.* Webb, for example, if the fact had been that Henley had recently died, and the court was called upon to decide, and did decide, that, at his death, the £14,200 devolved upon his issue in tail and the court thought it necessary to give a reason for its decision, the reason would undoubtedly have been that the £14,200 was land in equity. Why, then, could not Henley have suffered a recovery of the £14,200 in its quality of land, thus avoiding the expense, vexation, and delay, and even the risk of failure by his death, necessarily incident to the circuitous proceedings detailed in the report? Because a recovery never could be suffered, even in equity, of what was in fact money, though it were, by means of a fiction, deemed land in equity.[1] It was only of specific and identified real estate, *i. e.*, real estate in fact, that a recovery could be suffered or a fine levied, and courts of equity differed from courts of law on that point only in holding that an equitable title to such real estate in the person levying the fine or suffering the recovery was sufficient to render the fine or recovery valid in equity. The reader will see, therefore, that, when money is covenanted or directed to be laid out in land and the land to be settled, it is when the money is thus laid out, and not till then, that any of the persons in whose favor the covenant is made, or the direction given, first become, by virtue of such covenant or direction, owners of land in equity in any other than a purely fictitious sense, even assuming that the money may, by a fiction, properly be termed land in equity before it is actually laid out in land.

When a covenant or trust, instead of being to lay out money in the purchase of land, and to settle the land, is to sell land and make some disposition of the proceeds of the sale, it is equally clear that none of those in whose favor such proceeds are to be disposed of can possibly acquire the ownership, either at law or in equity, of any specific money until the land is actually sold, as, until then, there will be no identification of any money. This fact,

---

[1] "A fine cannot be levied of money agreed to be laid out in a purchase of land to be settled in tail; but a decree can bind such money equally as a fine alone could have bound the land in this case, if bought and settled." *Per* Sir John Trevor, M. R. in Benson *v.* Benson, 1 P. Wms. 130.

however, is not material in respect to the devolution of the rights created by the covenant or trust, as those rights will devolve in the same manner, both at law and in equity, before the sale of the land as the proceeds of the sale will devolve after the sale, namely, upon the executor of the deceased. That this is so as to the equitable conversion of the seller's land into money, caused by the ordinary bilateral contract for the purchase and sale of land, we have already seen,[1] and the same thing is true of every indirect equitable conversion of land into money. In respect, therefore, to the devolution of property indirectly converted in equity, our view need not be extended beyond the conversion of personal property into real property, and, in respect to devolution by will, the field is still more narrowed. In respect, indeed, to the equitable conversion of money into land, caused by the bilateral contract for the purchase and sale of land, the right created by the contract in favor of the purchaser is always devisable,[2] and it seems that it will pass by a specific devise of the land contracted for, or by a devise of all the testator's real estate, or of all his real estate in such a place, provided the land contracted for is in that place, or by a devise of the right itself under any words of description which sufficiently identify it; but it seems that it will not pass under any words which are applicable only to personal estate, unless the testator so identifies the right as to show that he means to pass it by such words; for there will be no equitable conversion of the purchaser's money into land, unless he be entitled to enforce the contract specifically, and, if he be so entitled, the right created by the contract in his favor will necessarily be a hereditament, *i.e.*, a right descendible to the heir.[3]

---

[1] 18 HARV. L. REV. 10, 255.

[2] Atcherley *v.* Vernon, 10 Mod. 518; Davie *v.* Beardsham, 1 Ch. Cas. 39, 3 Ch. Rep. 4; Lady Fohane's case, cited in 1 Ch. Cas. 39; Greenhill *v.* Greenhill, 2 Vern. 679; Prideux *v.* Gibben, 2 Ch. Cas. 144; Potter *v.* Potter, 1 Ves. 274, 437, 3 Atk. 719; Gibson *v.* Lord Montfort, 1 Ves. 485.

[3] In Rushleigh *v.* Master, 1 Ves. Jun. 201, 3 Bro. C. C. 99, by marriage settlement, £5,000, a part of the wife's marriage portion, was vested in trustees in trust to lay the same out in land to the use of the husband for life, remainder to wife for life, remainder, in the events which happened, to husband in fee; and hence the money belonged absolutely to the husband, subject only to an equitable conversion of it in favor of the wife for her life in the event of her surviving the husband, — which she did. It was assumed, however, that the money was wholly converted into land in equity, not only as to the wife, but as to the husband as well. In short, it was assumed that the money had ceased to have in equity the quality of money, having acquired the quality of land instead; and accordingly, the husband having died intestate as to the £5,000, it was assumed that it descended to his heir as land; and the question was whether it passed

In respect, however, to equitable conversions of money into land by means of unilateral covenants and trusts, it is to be observed, first, that such covenants and trusts are nearly always for the purchase and settlement of land, and that in all such cases the equitable conversion of the money into land is, on principle, confined to the estates for life and estates tail covenanted or directed to be limited by the settlement, and hence the rights created by such covenants and trusts are, on principle, never devisable, though the courts hold, as we have seen,[1] that the entire interest in the money is, in such cases, converted in equity into land, not only as to those in whose favor the land is covenanted or directed to be settled, but also as to the settlor and those claiming under him. Secondly, a devise of land which has any reference to "place" will not pass a right created by a covenant or trust to purchase and settle land,[2] as there is, in such a case, no identified land, and yet the testator shows, by his reference to place, that it was only actual and identified land that he intended to devise. Nor can such a right, as it seems, pass under words of bequest, *i. e.*, words which are applicable only to personal estate, unless the testator shows affirmatively that he intends to pass such right under such words;[3] for

as land under the will of the heir, the same having never been laid out in land; and it was held that it did so pass, namely, under the words "all other my messuages, lands, tenements, and *hereditaments*," Lord Thurlow saying that (1 Ves. Jun. 404 a) if the testator had said, "all my estates in law and equity," this would have passed; and the words "all my estates whatsoever and where soever" are equally strong. He also uses the word "hereditament," and this is a hereditament, for it is descendible.

[1] 18 HARV. L. REV. 261, 270; 19 HARV. L. REV. 24, proposition 8.

[2] I fear, however, this statement must rest upon principle rather than authority. In Guidot *v.* Guidot, 3 Atk. 254, Lord Hardwicke decided that money which he held to be converted into land passed, under the will of the owner, by the words, "Lands lying in Islington, and in Elsfield in Hampshire, or elsewhere." I say "money which he held to be converted into land," for Lord Hardwicke treated the money as converted "directly" into land, and therefore as having passed in its quality of land. He said (256): "If it had not been for the locality, estates in Middlesex and Hampshire, no doubt could have arisen; but then follows 'or elsewhere,' which is the most comprehensive word he could have used. It is said the lands do not lie anywhere, for they are not yet purchased. When people make such descriptions as the testator had done here, they intend to pass everything they have in the world; now the money is somewhere, and that by the transmutation of this court is changed into land."

If the case had been one in which the testator had merely a right to have money exchanged for land, and to have some estate in the land conveyed to him, Lord Hardwicke's reasoning would clearly not have been applicable to it. Such a right is not situated anywhere, as it is incorporeal. The case of Lingen *v.* Sowray, 1 P. Wms. 172, involved the same point as Guidot *v.* Guidot, and was decided the same way.

[3] Biddulph *v.* Biddulph, 12 Ves. 161; *In re* Greaves's Settlement Trusts, 23 Ch. D. 313, 316, *per* Fry, J.; *In re* Duke of Cleveland's Settled Estates, [1893] 3 Ch. 244;

the owner of such a right has no ownership of the money with which the land is to be purchased, even if such money is identified. Yet here again we are confronted with the fact that the courts unwarrantably extend the doctrine of the equitable conversion of money into land by means of directions contained in wills to cases in which no person has a right to enforce such directions, *i. e.*, to require an actual conversion to be made;[1] and, in all such cases, the courts are forced to treat the equitable conversion which they assume to exist as if it were created by equity itself, *i. e.*, as if it were direct, and hence to treat the money, for the purposes of devolution, as if it were actually land in equity, instead of being merely liable to be exchanged for land, and, when that step has once been taken, it is not difficult for the courts to take another step and say that a testator who, if there were in truth an equitable conversion, would have only a right to have the money laid out in land, and to have the land settled, is the owner of the money itself, and, therefore, that, while such money will descend as land in case of intestacy, yet its owner may devise it as land or money at his pleasure. This seems to be the only way of explaining the decisions of Sir G. Jessell, M. R., and the Court of Appeal in Chandler *v.* Pocock.[2] If the money in that case had been in truth indirectly converted into land in equity, and the settlor's daughter had merely had a right to have land purchased with the money and settled, and the case had been so regarded, it would have been quite impossible for the courts to hold that such right passed under a bequest of all the daughter's personal estate. I have endeavored, however, to show, in another place,[3] that there was no indirect conversion of the money into land in equity, and the same thing may be proved, even more conclusively, in another way; for the daughter's father settled the original land only upon himself, the daughter's husband and the daughter, for their respective lives, retaining in his own hands the reversion in fee expectant upon the determination of those three life estates; and, when the land was sold under the power contained in the settlement, of course the proceeds of the sale took the place of the land, and, when the

---

Chandler *v.* Pocock, 15 Ch. D. 491, 499, where Jessell, M. R., after expressing himself to the effect stated in the text, adds: "Not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old."

[1] 19 HARV. L. REV. 24, proposition 8.

[2] 15 Ch. D. 491, 499, 16 Ch. D. 648.

[3] See 19 HARV. L. REV. 95.

daughter died and her will took effect, the last of the three rights created by the settlement came to an end, the husband and father having previously died. It was impossible, therefore, that anything should pass, under what was held to be an appointment by the daughter's will, except the fund produced by the sale of the land, and that was all that was held to pass; and, though all the difficulty arose from its being held, erroneously, as it is conceived, that that fund had been converted in equity into land, yet it was the assumption that the fund was land in equity that made possible a decision which would have been impossible on the supposition that the same fund, instead of being land in equity, was merely liable to be exchanged for land.

When a contract, trust, or duty to convert money into land or land into money is not performed as soon as those in whose favor the conversion is to be made are entitled to have it performed, what compensation are the latter entitled to receive for the delay? In the case of a bilateral contract for the purchase and sale of land, neither party can claim any compensation for non-performance by the other until the latter is in default, *i. e.*, has broken the contract, and, as the two sides of the contract are to be performed concurrently, neither party can put the other in default until he has done everything towards performing his own side of the contract that he can do without the co-operation of the other. If, therefore, either party desires a prompt performance by the other, he should, as soon as the time for performance arrives, seek the other, and notify him of his own readiness, willingness, and ability to perform his side of the contract, and should offer to do so if the other will concurrently perform his side, and, if the latter refuses or neglects to do so, he will be in default. If a place, as well as a time, for performance have been agreed upon, each party must at his peril, unless the contract have, in the meantime, been performed, or the other party put in default, be at the place agreed upon at the close of business hours on the day agreed upon, and, if the other party be not there, he will then be in default. And when either party is thus put in default, the other will be in a condition to maintain an action at law for damages, or a bill in equity for specific performance, at his option, and, in case of the latter, he will, besides specific performance, obtain such compensation for the other's breach of contract as shall be just.

In the case of a unilateral covenant to purchase land, the covenant will be broken by any failure of the covenantor to

perform it according to its terms, and, if there be also a covenant to settle the land when purchased, he who would have been entitled to the immediate possession and enjoyment of the land, if purchased in accordance with the covenant, will be entitled, immediately on the breach of the covenant, to file a bill and obtain a decree for its specific performance, together with a compensation for the breach, and the proper measure of such compensation will, it seems, be the interest on the money covenanted to be laid out in land from the time when the plaintiff was entitled to have the land purchased to the time when it is actually purchased. If the breach shall consist only in not settling the land when purchased, the same person will be entitled to all the remedies incident to an equitable ownership of land.

The reader must, however, bear in mind that such unilateral covenants are commonly contained in marriage articles and marriage settlements, made by the intended husband, and that the land to be purchased is almost always covenanted to be settled, in the first instance, on the husband for life; and, therefore, there can be no breach of the covenant till the husband's death.

In the case of a trust or duty to purchase and settle land, or to sell land and dispose of the proceeds of the sale, it is plain that the creator of the trust or duty intends that those in whose favor the land to be purchased is to be settled, or in whose favor the proceeds of the land to be sold are to be disposed of, shall enjoy the money to be laid out in land from the time when it is first authorized to be so laid out to the time when it shall be actually laid out, or shall enjoy the land directed to be sold from the time when it is first authorized to be sold to the time when it is actually sold. How shall the creator of the trust or duty give effect to such his intention? Clearly, he can do so in one way only, namely, by making a gift of the money or the land, *i. e.*, of the income of the one or the other, for the period of time just specified, to the person or persons who would have been entitled to receive the income of the land, if the money had been laid out in land, or to receive the income of the proceeds of the sale, if the land had been sold, as there would otherwise be a resulting trust as to such income in favor of the creator of the trust or of his representative, or, if a duty be created, instead of a trust, the land to be sold or the money to be laid out will continue to be the property of the creator of the duty, or of his representative, both at law and in equity, until the land is actually sold or the money laid out.

Accordingly, all well-drawn wills or deeds, creating such trusts or duties, contain such a gift in express terms.[1] Suppose, however, the creator of a trust or duty omits to make any such gift? It seems to be clear that the gift ought to be implied.[2]

It may happen that the creator of a trust or duty, instead of making such a gift of the intermediate income of the money to be laid out in land or of the land to be sold, as is indicated in the preceding paragraph, directs that the money to be laid out shall comprise not merely the principal sum named, but also the intermediate income thereof, or that the money to be disposed of shall comprise, not only the proceeds of the land to be sold, but also

---

[1] Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; Guidot *v.* Guidot, 3 Atk. 254; Doughty *v.* Bull, 2 P. Wms. 320; Coventry *v.* Coventry, 2 Atk. 366; Thornton *v.* Hawley, 10 Ves. 129; Williams *v.* Coade, 10 Ves. 500; Biddulph *v.* Biddulph, 12 Ves. 161; Kirkman *v.* Miles, 13 Ves. 338; Maugham *v.* Mason, 1 Ves. & B. 410; Hereford *v.* Ravenhill, 1 Beav. 481, 5 *ibid.* 51; Wrightson *v.* Macaulay, 4 Hare 487; Batteste *v.* Maunsell, Irish Reports, 10 Eq. 97, 314.

[2] A gift of the proceeds of a sale of land to A for life is a gift to him of the rents and profits of the land till sale. *In re* Searle, [1900] 2 Ch. 829. This appears to be the true explanation of the decision in Earl of Coventry *v.* Coventry, 2 Atk. 366, where a testator, being seised in fee of the manor of A, and having a lease of the manor of B, directed his executors to exchange his manor of A for the reversion of the manor of B. The manor of B, of which the Church of Lincoln was seised in fee, was situated in Oxfordshire, while the manor of A was situated in Lincolnshire and near the Church of Lincoln, and, for this or some other reason or reasons, the testator seems to have had no doubt that the exchange which he directed would be for the advantage of the Church of Lincoln, and, in fact, he gives as a reason for directing the exchange that he desired "to be a benefactor to the Church of Lincoln"; and it appears, therefore, not to have occurred to him that the Church of Lincoln might decline to make the exchange. Nevertheless, the Church of Lincoln did so decline, and its declination was the cause of the present suit. The testator had directed that, when the exchange was made, the reversion of the manor of B should be settled on his wife for life, remainder to his issue male by her in special tail, with divers remainders over; and, under these limitations, the manor of B would, if the exchange had been made, have been vested in the plaintiff for life in possession, remainder to his issue in tail male; and, as the exchange could not be made, the plaintiff insisted that he was entitled to the manor of A; and it would seem that, on the principle stated in the text, he was entitled to the possession and income of the manor of A until the exchange could be made, and, if that time never arrived, he and those claiming under him would be entitled to hold possession of the manor of A in perpetuity; and Lord Hardwicke so decreed, saying (369): "Where a sum of money is given by the will of a testator to be laid out in the purchase of lands, or of lands in a particular county, and after they are bought to be settled upon such and such persons, if a bill is brought here, the constant ordinary course is to direct a purchase, and the produce of the money to go as the land itself, till purchased. This comes very near the present case. . . . It is carried too far, when it is said, no exchange can ever be made, for there is no time fixed for it, and therefore there may come a prebendary at Lincoln, who may consent to the exchange."

the intermediate income of the land;[1] and, in such a case, the income of the money or land must, of course, be accumulated till the money is laid out, or the land purchased. But, in the absence of an express direction to the contrary, it is clear that the intermediate income will go in the manner indicated in the preceding paragraph.

In the case of Pearson *v.* Lane,[2] land was conveyed to trustees in trust to sell the same, and lay out the proceeds in other land, and settle the latter on the grantor for life, remainder to the first and other sons of the grantor and his then wife successively in tail, remainder to their daughters as tenants in common in tail, remainder to the grantor in fee. Twenty-four years afterwards the grantor died, leaving two daughters, and thereupon, no sale of the land having been made, the daughters and their husbands levied fines of the land, and, twenty years later, the question arose whether the fines were valid, and had made the daughters equitable owners of the land in fee simple absolute. And that was supposed to depend upon whether the daughters had an equitable freehold in the land when the fines were levied. If the land had been sold, and its proceeds reinvested in other land, as directed, the daughters would have become, on their father's death, equitable tenants in tail in possession of the land purchased, under their father's deed of trust, and equitable owners of the reversion in fee by descent from their father. Had they any estate in the land of which the fines were levied? Clearly, the deed of trust gave them none, either at law or in equity. What, then, became of the equitable fee in that land immediately on the execution of the deed of trust? It resulted to the grantor, though subject to be devested by a sale of the land, as directed, and, on the grantor's death, it descended to his daughters, though subject to the same condition subsequent. By virtue of this equitable fee, the daughters could have levied fines, but fines levied by them would not have destroyed nor affected the condition by which their equitable title was liable to be defeated, for, the title of the trustees being legal, the fines would have been inoperative and void as to them. There was, however, one way, and one way only, in which they could obtain a perfect legal and equitable title to the land, namely, by filing a bill against the trustees and compelling them to convey

[1] Short *v.* Wood, 1 P. Wms. 470; Pearson *v.* Lane, 17 Ves. 101; Biggs *v.* Andrews, 5 Sim. 424.

[2] 17 Ves. 101.

the land to the plaintiffs, the ground for the bill being that, if the land were sold and other land purchased, the plaintiffs would be entitled to have the latter conveyed to them in tail, remainder to them in fee, and then they could, by levying fines, convert their estate tail into a fee simple absolute, and, therefore, as they could not levy fines effectively of the land held by the trustees, they were entitled to have the latter conveyed to them in fee simple without the levying of fines, their bill being a sufficient substitute for fines.

Sir W. Grant, M. R., held, however, that the daughters and their husbands had acquired a perfect title to the land by the fines which they had levied, he being of opinion that the daughters were equitable tenants in tail of the land when the fines were levied, and hence that the fines had made them equitable tenants in fee simple; and, though it does not appear that they had obtained any conveyance of the legal title, yet no objection was taken to the title on that ground, nor does the case give any information as to the trustees or their acts subsequent to the conveyance of the land to them. Upon what ground did Sir W. Grant hold that the daughters were equitable tenants in tail of the land when the fines were levied? Upon the ground, first, that, though the deed of trust gave them in terms no estate in the land to be sold, yet, as the trustees took only a naked legal title, and the equitable title must be somewhere, a court of equity would ascertain where it was by inquiring for whose benefit the trust existed, *i. e.*, who was the *cestui que trust*, and that here the grantee's daughters were the *cestuis que trust*, and consequently they took, under the trust deed, the same equitable estate that they would have taken in the land to be purchased, when purchased, namely, an equitable estate tail. To this, however, it may be answered that, though the daughters were *cestuis que trust* under the trust deed, yet they were to enjoy the land vested in the trustees only in the mode pointed out by the creator of the trust, namely, by its sale and the investment of the proceeds in other land, and that this was absolutely inconsistent with their having any interest in the land to be sold, except for so long as it should remain unsold.

Sir W. Grant says: [1] "Where money is given to be laid out in land, which is to be conveyed to A, though there is no gift of the money to him, yet in equity it is his; and he may elect not to

[1] P. 104.

have it laid out: so, on the other hand, where land is given upon a trust to sell, and to pay the produce to A, though no interest in the land is expressly given to him, in equity he is the owner; and the trustee must convey, as he shall direct." Undoubtedly this is true,[1] but why? Because A, being made the absolute owner of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the direction to lay the money out in land, or to purchase land, is inoperative and void. As A alone is interested in the question whether the money shall be laid out in land, or whether the land shall be sold, so he alone has a voice in the decision of that question. It follows, therefore, that, while in terms the gift to A is only of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the gift to him is, in legal effect, of the money to be laid out, or of the land to be sold, the direction to lay out the one, or to sell the other, going for nothing. Why, then, does the law thus wholly change the subject of the gift, instead of simply giving effect to it according to its terms? Because the law cannot do the former for the reason just stated, and, therefore, it does the latter to prevent the purpose of the giver from being totally defeated. The law, therefore, changes the subject of the gift for the best of reasons, namely, *ut res magis valeat quam pereat.*

C. C. Langdell.

CAMBRIDGE, October, 1905.

---

[1] A gift of the proceeds of a sale of land is an absolute gift of the land itself *In re* Daveron, [1893] 3 Ch. 421, 424.